

FEDERAL CIRCUIT COURT OF AUSTRALIA

NGUYEN v MINISTER FOR IMMIGRATION &
ANOR

[2021] FCCA 212

Catchwords:

MIGRATION – Administrative Appeals Tribunal – Partner (Residence) (Class BS) (Subclass 801) visa – whether findings made by the Tribunal were unsupported by evidence – whether the Tribunal decision was seriously lacking in foundation, rationality, and logical coherence, in a way that was legally unreasonable – whether the Tribunal failed to comply with its obligation under s 359A of the *Migration Act 1958* (Cth) to give the applicant clear particulars of information that the Tribunal considered would be the reason, or a part of the reason for affirming the delegate’s decision – whether the Tribunal misconstrued the meaning of the term “spouse” and in so doing, misapplied s 5F of the *Migration Act 1958* (Cth) and r 1.15A of the *Migration Regulations 1994* (Cth) – legal unreasonableness – whether jurisdictional error is made out – no jurisdictional error is made out – the application is dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 359AA,
Migration Regulations 1994 (Cth), cl.801.221(6), scl.2, r. 1.15A(3)

Cases cited:

Abebe v Commonwealth of Australia (1991) 197 CLR 510
AEX15 v Minister for Immigration and Border Protection [2017] FCA 821
AVQ15 v Minister for Immigration and Border Protection [2018] FCAFC 133
CBY15 V Minister for Immigration [2020] FCA 878
DAO16 v Minister for Immigration (2018) 258 FCR 175
Minister for Immigration and Citizenship v Li (2013) 297 ALR 225
Minister for Immigration and Citizenship v SZNGP [2010] FCAFC 51
SAAP v Minister for Immigration (2005) 228 CLR 204
SZNGO v Minister for Immigration and Citizenship. [2010] FCA 297

Applicant:

THI KIM LEIN NGUYEN

First Respondent:

MINISTER FOR IMMIGRATION,
CITIZENSHIP, MIGRANT SERVICES
AND MULTICULTURAL AFFAIRS

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:	SYG 2058 of 2019
Judgment of:	Judge Humphreys
Hearing date:	27 January 2021
Date of Last Submission:	27 January 2021
Delivered at:	Parramatta
Delivered on:	12 February 2021

REPRESENTATION

Counsel for the Applicant: Mr Poynder

Solicitors for the Applicant: Vinh Duong & Associates

Counsel for the Respondents: Mr Johnson

Solicitors for the Respondents: Hwl Ebsworth Lawyers

ORDERS

- (1) The application is dismissed.
- (2) The applicant to pay the first respondent's costs as agreed or assessed.
- (3)
- (4)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PARRAMATTA

SYG 2058 of 2019

THI KIM LEIN NGUYEN

Applicant

And

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant is a citizen of Vietnam. The applicant first arrived in Australia as the holder of a Student visa.
2. On 7 August 2012, the applicant applied for a Partner Class BS (Subclass 801) visa on the basis of her relationship with her sponsor, Mr Nguyen. On 6 February 2018, a delegate of the Minister for Immigration (“the delegate”) refused to grant the applicant her visa on the basis that the applicant was never in a genuine and continuing relationship with her sponsor and was therefore never the spouse of the sponsor as defined in s 5F of the *Migration Act 1958* (“the Act”).

3. The applicant sought merits review at the Administrative Appeals Tribunal (“the Tribunal”). In a decision dated 18 July 2019, the Tribunal affirmed the delegate’s decision not to grant the applicant her Partner visa.
4. The applicant now seeks judicial review of the Tribunal decision.

The Administrative Appeals Tribunal Decision

5. The Tribunal decision is reasonably lengthy. Given that the grounds of judicial review, which claim that there is no evidence for certain factual findings made by the Tribunal, it is appropriate to summarise at some length the Tribunal decision. It should be noted that the full names of the various persons involved in this matter other than the applicant have not been used in this judgment but have been shortened to surnames only for privacy reasons.
6. Paragraphs 4 through to 19 of the Tribunal decision deal with the background of the matter.
7. The applicant and the sponsor Mr XT Nguyen claim that they first met each other on 24 December 2011. It is claimed that the applicant fell pregnant to the sponsor and the parties were then married on 5 June 2012. The applicant gave birth to a son, Master H Vu Nguyen in November 2012. The sponsor was named as the father on the child’s birth certificate.
8. The Tribunal noted at paragraph 6 of its decision, that the Department of Immigration and Border Protection (“the Department”) received an anonymous report on 10 September 2012 claiming that the relationship between the applicant and her sponsor was contrived and that the parties were not in a genuine relationship. The report claimed that the applicant had paid the sponsor \$60,000.00 to sponsor her, so that she and her son could live in Australia. It was reported that the applicant was living with another man, Mr Vu.
9. The parties provided to the Department a number of documents in support of the application including telephone records, statements by friends and family members supporting the application and bank records. The applicant was granted a subclass 820 Partner (Temporary) visa on 1 February 2013.

10. The Department received a further anonymous report in February 2015 that the applicant and her sponsor were in a contrived relationship. That report further stated that the father of the applicant's child was not the sponsor but was Mr Vu, who was a Vietnamese national and international student living in Australia. It was further reported that the applicant and her child were currently living with Mr Vu and not the sponsor.
11. The Department obtained information that Mr Nguyen, was also the sponsor of a second person, Ms Truong, who had filed a Partner visa application on 1 February 2013. In that application, it was claimed that the parties had met on 8 February 2011 and a relationship developed after that date. It was claimed that the parties were married on 20 January 2013. Statements were provided by friends supporting the claim that the parties were in a relationship with each other and that they were living together.
12. The Department wrote to the applicant with this information, inviting the applicant to comment on or respond to that information. The invitation included having deoxyribonucleic acid ("DNA") testing to establish the paternity of the applicant's child. In the applicant's response, she claimed that her sponsor would often come home drunk and threaten her. The applicant's sponsor had numerous gambling debts and he became violent towards the applicant. The parties moved to a different home in Padstow in August or September 2013. In January 2014 the sponsor bought the applicant and her child a ticket to return to Vietnam and she left her son with her parents. The applicant then returned to Vietnam in April 2014 to come back to Australia with her son. When the documents in support of the second stage of the grant of the Partner visa application were lodged, the applicant and the applicant's sponsor were living together with their son although their relationship was strained. In November 2014, the applicant claims that she received information that her sponsor had been seeing another woman in Chinatown. When the applicant confronted the sponsor with this information he became violent towards her, she left the home and the applicant has not seen him since. The applicant contacted the sponsor's parents to arrange their help for DNA paternity testing of the child, however, the sponsor and his parents would not cooperate.

13. The applicant provided further documents in support of her claim that she had suffered relevant family violence. The applicant also provided documents to support the claim that the parties had been in a genuine relationship, including correspondence addressed to the parties at the home they shared in Padstow.
14. The delegate determined, that in order to meet the criteria in cl 801.221 (6) of the *Migration Regulations 1994* (Cth) (“the *Regulations*”), which relates to consideration of claims in circumstances where the applicant has suffered family violence, the applicant was required to first show that she would meet the requirements of subclause (2) or (2A) of the *Regulations*, which require that the applicant is the spouse of the sponsoring partner except that the relationship between the applicant and the sponsoring partner has ceased.
15. The delegate noted all of the information including third-party information provided to the Department which indicated that the applicant was in a continuing relationship with Mr Vu and that he was the biological father of her child. The delegate also noted that the applicant travelled to Vietnam from 6 November 2011 to 26 November 2011 and again on 11 April 2012 until 26 April 2012 at the same time Mr Vu was travelling on the same flights to and from Vietnam.
16. Further, the claims the applicant made as to family violence were in contradiction to the claim she had previously made in a statement dated 5 August 2014 which undermined the credibility of any information provided by the applicant. The fact that the sponsor provided a statement dated 5 August 2014 claiming that he was in a continuing relationship with the applicant at the same time as sponsoring another application filed on 1 February 2013 claiming he was in a relationship with another woman, undermines the credibility of any information that the sponsor had provided. Further the evidence that the applicant suffered family violence was all dated after the Department had contacted the applicant with information adverse to her case and there was no information that she sought any treatment or assistance with regards to any claims of family violence before that date.
17. Accordingly, the delegate was not satisfied that the applicant and the applicant’s sponsor had ever been in a genuine and continuing relationship, that they ever had a mutual commitment to a shared life as

husband and wife to the exclusion of all others, and that they had ever lived together. As the delegate found the applicant was never the spouse of the sponsor as defined in s 5F of the *Act*, the application was refused without the need to consider whether there was a child of the relationship or whether the applicant has ever suffered relevant family violence.

18. At paragraph 19 onwards of its decision, the Tribunal records the information provided to it by the applicant. The Tribunal noted that it explained the process under s 359AA of the *Act* and that it would be putting information to the applicant which would be the reason, or part of the reason, for affirming the decision under review. It was explained to the applicant that she could comment or respond to that information and if she required more time, that she could request an adjournment.
19. The applicant told the Tribunal that she had studied English and hospitality at Holmes College from 2009 but had ceased studying in about April 2012. The applicant stated that she was not receiving any financial support from the sponsor for her child and was not registered with the Child Support Agency for the sponsor to be assessed for the payment of child support for her child. The applicant claimed that she was not aware of the Child Support Agency and that she had done nothing to have her sponsor provide any financial contribution for the support of her son.
20. The applicant told the Tribunal that she and her sponsor had accounts in their personal names and that after they got married they opened a joint account. The applicant said that her sponsor worked in a restaurant and was paid cash in hand but sometimes deposited money into their joint account.
21. The applicant said that she and her sponsor were living with his family in Bankstown until September 2012. The applicant had not had any contact with the sponsor's family since 2015 and no contact with the sponsor since November 2014. The applicant said that neither the sponsor nor any members of his family have sought to have any contact with her son.
22. In relation to claims that the applicant had suffered relevant family violence, the applicant said she did not know she had suffered family

violence until after she had spoken to her migration agent 2015. The applicant confirmed that she had seen a doctor over the course of her relationship, but never raised any complaint that she was suffering from family violence.

23. In relation to Mr Vu, the applicant stated that she did not know him and had never met him. She denied having any knowledge of him. At paragraph 28 of its decision, the Tribunal referred to the Provider Registration and International Student Management System (“PRISMS”) records of Mr Vu, which indicated that he was studying at Holmes College at the same time as the applicant. The Tribunal suggested that it was relevant as it indicated that the applicant would have met and known Mr Vu and this undermined the credibility of the claims that she was making. The applicant reiterated that she did not know Mr Vu and has never been in a relationship with him at any time.
24. At paragraph 30 of its decision, the Tribunal referred to the movement records of the applicant and Mr Vu. These indicated that the applicant and Mr Vu travelled together on the same flight to Vietnam in November 2011, going through Customs together at the same time at 9.40am on 6 November 2011 and returning together on the same flight on 26 November 2011. This was relevant as it indicated that the applicant and Mr Vu knew each other and were likely to be in a relationship and this undermined the credibility of the information being provided by the applicant. The applicant replied that it was just a coincidence that she and Mr Vu happened to be on the same flight to Vietnam and the return flight to Australia. The applicant said that she could not recall who she sat next to on the flights and that it would be totally by chance if they were sitting together on the flight to Vietnam and the return flight to Australia. The applicant said that it was a coincidence that she and Mr Vu happened to go through Customs at the same time.
25. At paragraph 32 of its decision, the Tribunal again referred to the movement records of the applicant and Mr Vu. These records show that the applicant and Mr Vu travelled together on the same flight to Vietnam in April 2012 and going through Customs together at 9.02am on 11 April 2012 and returning together on the same flight on 26 April 2012. The Tribunal noted that this undermined the credibility of the

information provided by the applicant that she had never met or known Mr Vu. The applicant claimed it was mere chance that they happened to be on the same flights together, and claimed her relationship with her sponsor was genuine.

26. At paragraph 34 of its decision, the Tribunal referred to a report received by the Department on 10 September 2012 alleging that the applicant had paid the sponsor to enter into a contrived relationship. The report alleged that the applicant was pregnant to Mr Vu, not the sponsor and that the applicant's relationship with the sponsor was contrived.
27. At paragraph 36 of its decision, the Tribunal referred to report received by the Department on 11 January 2019 alleging that the applicant had entered into a contrived relationship with the sponsor and that she was actually in a relationship with Mr Vu, who was the father of her child. It was claimed that the person who provided the information had not previously provided any information to the Department. The applicant said she knew nothing about these claims, that her relationship the sponsor was genuine and that she hoped to be able to find him to prove that he was the father of her child.
28. At paragraph 38 of its decision, it was noted that the Tribunal referred to the application for a Partner visa that was filed by Ms Truong on 31 January 2013 which was sponsored by Mr Nguyen. In that application, it was claimed that the parties had met each other on 8 February 2011, had commenced a relationship with each other in March 2011 and that they were married on 20 January 2013. The Tribunal noted this was relevant, as it indicated that the applicant and the sponsor did not have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship claimed, was never genuine and continuing.
29. The applicant stated that she and the sponsor did live together until he left the home in November 2014. The applicant claimed that she did not know anything about this claimed other relationship, until the Department told her about it in 2015.
30. The Tribunal noted that the evidence provided by the sponsor and Ms Truong in support of the Partner Visa application included similar

information as to that supplied by the applicant in her application. The Tribunal also referred to statements provided by witnesses in support of the application, claiming they had met the sponsor and Ms Truong in various social events and had met his family. This further undermined claims made by the applicant that she had been in a genuine relationship with the sponsor. The applicant claimed that she and her sponsor did live together and that he was the only one who earned money and paid for everything. The applicant said that her sponsor used money out of their joint account to repay his car loan.

31. At paragraph 42 of its decision, the Tribunal asked the applicant how the first or given name of her son was chosen. The applicant said that her mother-in-law chose the name H because she liked it. The Tribunal asked how the second name of Vu was chosen. The applicant said her mother-in-law chose the name because the name is associated with a dragon flying through the sky. The Tribunal noted that the allegation was that the applicant was in a relationship with Mr Vu, who had another child whose given name also started with the letter H. The applicant's child's name was similar to the name of Mr Vu's other son. The applicant said that this was just a coincidence. The applicant's agent argued that the use of the name Vu was completely different, because it was not used as the family name. The Tribunal noted that the applicant could have provided false information when registering the child as the sponsor's child.
32. Paragraphs 45 of the Tribunal decision onwards, deal with the consideration of the claims and evidence. At paragraph 49 of its decision, the Tribunal was satisfied that the parties were married to each other under a marriage that was valid for the purposes of the *Act* as required by s 5F(2) of the *Act*.
33. At paragraph 50 of its decision, the Tribunal found that the applicant was not a credible witness and found that she had manipulated evidence to support her application, which was not a true reflection of the claimed relationship between herself and her sponsor. The Tribunal did not accept that the applicant did not know who Mr Vu was, that she had no relationship with him or knowledge of his whereabouts or any other facts about him. The Tribunal was satisfied that there was substantial evidence which would indicate that the applicant knows and

has been in a relationship with Mr Vu and that he is the father of the applicant's child. This includes evidence that the applicant and Mr Vu had attended Holmes College together in 2012, and that they travelled to Vietnam together on the same flight on 6 November 2011, both going through Customs clearance at 9:40am. The applicant and Mr Vu then returned to Australia from Vietnam on 26 November 2011 on the same flight. The Tribunal noted the evidence of the applicant that she may have travelled in the seat next to Mr Vu both travelling to and on the return flight to Australia.

34. The Tribunal noted that the applicant and Mr Vu travelled together to Vietnam on the same flight on 11 April 2012 both going through Customs clearance at 9.02am. The applicant and Mr Vu returned to Australia from Vietnam on 26 April 2012 on the same flight. The Tribunal noted the evidence of the applicant that she may have travelled in the seat next Mr Vu on their flight to and from Vietnam.
35. The applicant's child was conceived in the period between the applicant's first return to Vietnam with Mr Vu in November 2011 and the second return visit to Vietnam together in April 2012.
36. The Tribunal further noted that the applicant's child was given the name H Vu Nguyen, with the second name being the family name of Mr Vu.
37. At paragraph 56 of its decision, the Tribunal noted that it generally places little weight on anonymous allegations. The Tribunal and the applicant did not have the opportunity to question the person making the allegation or the basis on which, the claims were made. The Tribunal noted that there are multiple reasons why false allegations can be made by a person, including a desire to harm the applicant for personal reasons. At most, the receipt of anonymous allegation is only of use to ensure that there is close scrutiny of claims made by the applicant. The Tribunal went on to note that the allegation was that the applicant was actually in relationship with Mr Vu and that he was the father of her child. The applicant claims that Mr Vu is not a person she knows, she has never met him and has no idea how to contact him. The first allegation was made on 10 September 2012, before the birth of the applicant's child and was again repeated on 13 February 2015. The Tribunal notes that the allegations could have been made by the same

person however some limited weight should be given to the allegations made.

38. At paragraph 58 of its decision, the Tribunal concluded that overall, the weight of evidence supports a finding that the applicant has been, since before she conceived her child or started any claimed relationship with the sponsor, in relationship with Mr Vu, and that he is the father of her child. The fact that the applicant denies any knowledge of Mr Vu undermines her credibility both as to this issue and her other claims as to her relationship with the sponsor.
39. At paragraph 61 of its decision, the Tribunal found the claims made by the applicant that she does not know the whereabouts of Mr Vu, her sponsor or any member of the sponsor's family to be false and that the claims were made to prevent any DNA testing to establish the paternity of her child.
40. At paragraph 62 of its decision, the Tribunal noted that the applicant has failed to make any application for child support assessment to obtain some financial support from the father of the child. The applicant claimed that she did not know she could do this. The Tribunal found that had the applicant taken this step, it would be likely that the sponsor would challenge the assessment for child support and that DNA testing would establish that he was not the father of her child.
41. At paragraph 63 of its decision, the Tribunal noted the documentation that had been provided in relation to a joint bank account with the sponsor, receipts for the purchase of various items of personal property and correspondence addressed to the applicant and the sponsor at the home that they claimed they were sharing. The documents provided, were similar to those provided by Ms Truong in support of her application for a Partner visa, naming Mr Nguyen as her sponsor.
42. At paragraph 64 of its decision, the Tribunal noted that it was only after the Department wrote to the applicant in February 2015 with information indicating that the applicant's relationship with the sponsor was contrived, that she through her then migration agent, responded by claiming that she was shocked and distressed to hear the allegation made and was anxious to undergo DNA testing. The applicant did not indicate that her relationship with the sponsor had ended, although she

indicated that she would attempt to contact her husband who was believed to be in Vietnam. The applicant made no claim that she suffered family violence.

43. At paragraph 65 of its decision, the Tribunal notes that it was only after the applicant obtained new representation that she claimed on 16 March 2016 that her relationship had broken down and she had suffered family violence during the relationship. The allegations of family violence were inconsistent with previous claims made by the applicant and this undermined her credibility.
44. At paragraph 70 of its decision, the Tribunal found that the applicant had been willing to provide false misleading information to the Department and the Tribunal in order to support her application to obtain an immigration outcome without any regard to the truth.
45. Paragraph 71 of its decision and onwards, deals with financial aspects. At paragraph 74 of its decision the Tribunal places no weight on the joint bank account in the name of the applicant and the sponsor as indicating that the parties were pooling their financial resources and had shared financial expenses. The Tribunal found that this joint bank account was opened expressly for the purpose of supporting the Partner visa application and was not a genuine reflection of any relationship between the applicant and the sponsor. The Tribunal was not satisfied that the documentation provided in the claims made, indicated that the parties were in a genuine and continuing relationship and that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others.
46. Paragraph 78 of its decision onwards deals with household aspects. This included documentation that the applicant and the sponsor were originally living together in the family home of the sponsor before moving to rented accommodation by themselves. A joint tenancy agreement was provided. Evidence was provided of correspondence sent by the applicant and the sponsor both jointly and individually, to the places that they claimed to have lived together. This was similar to the information provided in the application by Ms Truong in her application for a Partner visa naming Mr Nguyen as her sponsor. Accordingly, the Tribunal placed little weight on this documentation as indicating that the parties were living together in the same household.

The Tribunal found that the applicant's sponsor deliberately manipulated the information provided, to support the application and that it was not a true reflection of any claimed relationship between them. Overall the Tribunal was not satisfied that the parties had lived together in a shared household. Although the sponsor may have arranged for correspondence to be sent to the home that the applicant was residing, the Tribunal was not satisfied that the sponsor was living there on a permanent basis, or at all.

47. Paragraphs 84 of its decision and onwards deal with social aspects of the relationship. The parties provided photos of themselves together and with the applicant's child at various social events. Statements were provided by witnesses including the sponsor's father, which claimed that they believed that the relationship was genuine and that they had been living together happily for over two years. It was claimed by the sponsor's father that the parties were devoted and caring to each other. This was inconsistent with a statement provided by friend of the applicant in support of the claim that the applicant suffered family violence. The evidence of a social relationship was also inconsistent with evidence provided by various witnesses that socialised with the sponsor and Ms Truong. The information provided in the differing applications indicate that the sponsor was recognised by his friends and family as having been married to both the applicant and to Ms Truong at the same time. The Tribunal found that it was not plausible that, if the sponsor was claiming to be married to Ms Truong, the sponsor's father would not be aware of that fact. The fact that the sponsor's father provided a statement in support of the application by the applicant in this matter, undermines the credibility of the claims he makes in that statement.
48. At paragraph 88 of its decision, the Tribunal notes inconsistencies in the applicant's claims as to why the sponsor could not accompany the applicant and her child, when visiting Vietnam. At paragraph 89 of its decision the Tribunal was not satisfied that the applicant and the sponsor had a mutual commitment to each other to the exclusion of all others. The Tribunal was satisfied that any photos purporting to show the applicant and the sponsor at social occasions were staged, and not reflective of the claimed relationship.

49. Paragraph 90 and onwards of the Tribunal decision, deals with the commitment of the parties to each other. The Tribunal was not satisfied that the parties have shown any commitment to the relationship. The fact that the sponsor was sponsoring Ms Truong for a Partner visa and at the same time claiming to be married to her whilst sponsoring the applicant, was in the Tribunal's view the clearest evidence that the parties never had a mutual commitment to a shared life as husband and wife to the exclusion of all others. The claims made by the applicant in a statutory declaration dated 5 August 2014 as to the commitment she and the sponsor had to the claimed relationship, is inconsistent with the information provided full by her in a statement dated 16 March 2015 claiming she was suffering from family violence.
50. At paragraph 94 of its decision, the Tribunal notes that whilst the applicant claims that the sponsor is the father of her child, it does not accept this is the case. The Tribunal does not accept that the applicant has not been able to locate either the sponsor or any member of his family who would cooperate in carrying out DNA testing to establish whether the sponsor is the father of her child. Further, the applicant has not registered with the Child Support Agency to claim child support from the applicant. Despite claims that the sponsor's family were actively involved in the care and support of the child, neither the sponsor, nor any member of his family, has sought to have any future contact with the applicant's child. The Tribunal did not accept that if the sponsor was the father of the applicant's child, his parents would not wish to see or have some contact with their grandchild.
51. Paragraphs 98 through to 103 of the Tribunal decision, deal with other matters. The Tribunal found that the applicant was in a relationship with Mr Vu, and not the sponsor. The Tribunal found that the sponsor was not in an exclusive relationship with the applicant but rather, was in a relationship with Ms Truong. This indicated that neither the applicant nor the sponsor had a commitment to a shared life with each other as husband and wife to the exclusion of all others as required by the *Act*.
52. At paragraph 99 of its decision, the Tribunal found that the applicant provided false information as to the course of a claimed relationship to obtain the immigration outcome that she desired. The Tribunal further

noted that, as at the time of its decision, the applicant had acknowledged that she was not in a continuing relationship with sponsor and that the only basis of her meeting the time of decision criteria is by satisfying cl 801.221(6) of the *Regulations*. That requires that the applicant would meet the requirements of subclause (2) or (2A) of the *Regulations* except that the relationship has ceased. As the Tribunal concluded, the applicant was never the spouse of the sponsoring partner the applicant does not meet the criteria for the grant of the visa. Accordingly, the Tribunal affirmed the decision to refuse to grant the applicant a Partner (Residence) (Class BS) visa.

Grounds of Judicial Review

53. In an amended application filed on 23 December 2020, the applicant abandons the initial ground relied upon and raised four new grounds of judicial review as follows:

Ground One

54. *The finding made at [52] by the second respondent (the Tribunal), that there was “...substantial evidence which would indicate that the applicant knows and has been in a relationship with Mr Vu” (who was not the applicant’s sponsor), was unsupported by the evidence and failed to take account of evidence and submissions provided by the applicant, such that the decision was seriously lacking in foundation rationality, and logical coherence in a way that was legally unreasonable.*

Particulars

- a) *There was no evidence to support the assertion by the Tribunal, at [53] dot point 1, that “The applicant and Mr Vu attended Homes College together in 2012”, in the sense that they had attended the College in the company or close association with each other.*
- b) *There was no evidence to support the assertion by the Tribunal, at [53] dot point 2, that “The applicant and Mr Vu travelled together to Vietnam on the same flight on 6 November 2011...”, in the sense that they had travelled in the company of or close association with each other.*
- c) *There was no evidence to support the assertion by the Tribunal, at [53] dot point 3, that “The applicant and Mr*

Vu returned together to Australia from Vietnam on 26 November 2011 on the same flight 1”, in the sense that they had travelled in the company of or close association with each other; moreover this assertion failed to consider that the applicant had not gone through Customs at the same time as Mr Vu, but had gone through Customs one minute and 37 seconds before Mr Vu.

- d) There was no evidence to support the assertion by the Tribunal, at [53] dot point 4, that the applicant had given evidence “that she may have travelled in the seat next to Mr Vu, both travelling to Vietnam and on their return flight to Australia”.*
- e) There was no evidence to support the assertion by the Tribunal, at [53] dot point 5, that “The applicant and Mr Vu travelled together to Vietnam on the same flight on 11 April 2012”, in the sense that they had travelled in the company of or close association with each other; nor was there evidence that “both [had gone] through Customs clearance at 9:02”, when in fact the evidence was that Mr Vu had gone through Customs 44 seconds before the applicant.*
- f) There was no evidence to support the assertion by the Tribunal at [53] dot point 6, that “the applicant and Mr Vu returned together to Australia from Vietnam on 26 April 2012 on the same flight...”, in the sense that they travelled in the company of or close association with each other.*
- g) There was no evidence to support the assertion by the Tribunal, at [53] dot point 7, that the applicant had given evidence “that she may have travelled in the seat next to Mr Vu, both travelling to Vietnam and on their return flight to Australia”.*
- h) The assertion by the Tribunal at [53] dot point 8, that “The applicant’s child was conceived in the period between the applicant’s first return visit to Vietnam with Mr Vu in November 2011 and their second return visit to Vietnam together in April 2012”, was not probative of the applicant having been in a relationship with Mr Vu; furthermore the Tribunal failed to take into account that the applicant had met her sponsor during this period, on 24 December 2011.*
- i) There was no evidence to support the assertion by the Tribunal at [53] dot point 9, that “The applicant’s child*

was given the name H Vu Nguyen, giving the surname of the sponsor as she was claiming it was his child, but giving the second name 'Vu' being the family name of Mr Vu"; or that the use of the name "Vu", in the name of the applicant's child, was probative of the applicant having been in a relationship with Mr Vu.

- j) The Tribunal at [57] gave weight to anonymous allegations that the applicant was in a relationship with, and had a child with, Mr Vu, in circumstances which did not logically, rationally or reasonably allow inferences of fact to that end to be drawn.*

Ground Two

The finding made at [100] by the Tribunal that "...the claimed relationship between the applicant and the sponsor has never been genuine and continuing and that they have never had a mutual commitment to a shared life as husband and wife to the exclusion of all others", was unsupported by the evidence and failed to take account of evidence and submissions provided by the applicant, such that the decision was seriously lacking in foundation, rationality, and logical coherence in a way that was legally unreasonable.

Particulars

*a) In relation to the **financial aspects of the relationship** between the applicant and her sponsor:*

- i. The finding by the Tribunal, at [74], that the joint bank account held by the applicant and her sponsor "was opened expressly for the purpose of supporting the Partner visa application and is not a genuine reflection of any relationship between the applicant and the sponsor":*

- was not supported by any probative evidence; alternatively, it was based on evidence that was not probative of the parties not being in a genuine relationship; namely;*
 - the parties retained bank accounts in their sole name - [72];*
 - that the sponsor had a joint bank account with Ms Truong at the same*

time as he had a joint bank account with the applicant – [72];

- *that the details of the sponsor's joint bank account with Ms Truong were similar to the details provided in relation to the sponsor's joint bank account with the applicant, "in that there are cash deposits and payments for various expenses- [73]; and*
- *failed to take account of evidence contrary to this finding namely:*
 - *that any bank accounts held by the applicant and her sponsor in their sole names pre-dated their marriage and were "hardly used" after they were married(Transcript, Q41 and 42); and*
 - *That the parties' joint account showed numerous payments to supermarkets and other retailers which were obviously for day-to-day household expenses, and a pooling of resources in relation to various items, including payments for a Toyota vehicle and insurance for the vehicle is by the sponsor; and payments for a Vodafone used by the applicant.*

ii. the finding by the Tribunal [75] that receipts provided by the applicant as evidence of joint purchases with her sponsor; were "similar" to the information provided by Ms Truong as evidence of joint purchases with the same sponsor; and that this indicated that the sponsor "had been complicit in providing a receipts" for each party, was not supported by the probative evidence. The only receipts provided by Ms Truong were for a wedding dress and a wedding ring, a mattress, a bed and an electric kettle, whereas the applicant provided more than twenty receipts for the printing of wedding cards, a bed and bedroom furniture, dining chairs, an electric blanket, televisions, DVD players, a juice fountain, a dryer, a washing machine, a blender, kettles and an electric wok. Taken as a whole, there were no material similarities between the receipts provided by Ms Truong and the applicant.

*b) In relation to **the nature of the household**:*

i. The finding by the Tribunal, at [80], that the sponsor had provided “similar sets of documents” in both this application and in his sponsorship of Ms Truong as evidence that the respective parties were living together in the same household, and that this meant the applicant and the sponsor had “deliberately manipulated the information provided to support the application”, and that it was not a true reflection of the claimed relationship, was not supported by the probative evidence:

- The applicant claimed that she and the sponsor were originally living together in the family home of the sponsor before moving to rented accommodation by themselves; however this was not claimed by Ms Truong and the sponsor – see [78-79].*

- The applicant provided a joint tenancy agreement of her claimed shared premises with the sponsor; however this was not provided by Ms Truong and the sponsor- see [78-79].*

- Evidence was provided by the applicant of correspondence sent her and the sponsor, both jointly and individually, to the places they claim to have lived in together; however no such evidence was provided by Ms Truong and the sponsor- see [78-79].*

a. The assertion by the Tribunal at [81] that “during the hearing, the applicant claimed that throughout their relationship until November 2014, the sponsor was living with her and staying with her in her home every night”, was not supported by any probative evidence.

b. the assertion by the Tribunal at [81] that “information [was] provided in support of the application of Ms Truong which indicates that those witnesses saw the sponsor and Ms Truong living together”, is not supported by any probative evidence.

Ground Three

The Tribunal failed to comply with its obligation under s 359A of the Act to give the applicant clear particulars of the information that the Tribunal considered would be the reason, or part of the reason, for affirming the decision that was under review, such that the applicant was unable to understand why the information would have been relevant to the review and the consequences of it being relied on, and unable to adequately comment on or respond to the information.

Particulars.

The Tribunal did not provide the applicant with accurate, clear or complete particulars of the information contained in files that it had in its possession relating to Mr Vu and Ms Truong.

Ground Four

*The Tribunal misconstrued the meaning of “spouse” and so misapplied s 5F of the Act, and reg 1.15A of the Migration Regulations 1994, by placing undue emphasis on events which were said to have occurred **before** the time of the application for the visa on 7 August 2012 (namely, alleged visits by the applicant to Vietnam together with Mr Vu in November 2011 and April 2012) and events which were said to have occurred after the time of the application for the visa (namely, the marriage of the sponsor to Ms Truong). The Tribunal failed to assess the genuineness of the relationship between the applicant and her sponsor based on the evidence existing as at the time of the visa application, on 7 August 2012.*

Evidence of the Parties

55. The following evidence was tendered by the parties:

- a. Court Books, Exhibit 1.
- b. Documents produced under subpoena Exhibit 2.
- c. Affidavit of Hailey Musgrave, Solicitor, dated 29 October 2020, Exhibit 3.
- d. Affidavit of Hailey Musgrove, Solicitor, dated 21 January 2021, Exhibit 4.
- e. Affidavit of Sophie Given, Solicitor, dated 21 January 2021, Exhibit 5.

- f. Affidavit of Renee Quinn, Solicitor, dated 22 October 2020, Exhibit 6.

The Applicant's Submissions

56. Counsel for the applicant submitted initially that whether a credibility finding is infected by jurisdictional error is “*a case specific enquiry*”: see *DAO16 v Minister for Immigration* (2018) 258 FCR 175 at [30].
57. The applicant complains that the Tribunal’s finding at paragraph 5 of its decision, that she was not credible witness and had manipulated the evidence to support her application, and that at paragraph 52 that she knows and has been in a relationship with Mr Vu, cannot be supported on a detailed examination of the evidence. Issue is taken with each of the nine dot points at paragraph 53 of the Tribunal decision, where it is claimed that the conclusions are simply not based on the evidence that was before it. Further, it is claimed that the Tribunal’s analysis of the four prescribed circumstances of the relationship required to be considered under r 1.15A(3) of the *Regulations*, being the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the person’s commitment to each other was also faulty.
58. It was submitted that the conclusions of the Tribunal that evidence was similar in both the applicant’s application for a Partner visa and that of Ms Truong, did not lead to the conclusion that little weight could be placed upon that material. It was submitted during the course of submissions there was little in the way of similarity in the financial statements and in relation to the receipts that were provided for household purchases. It was submitted, by way of analogy, that the credibility findings could be likened to the legs of the table. If one or more of the legs of the table were to be shown to be faulty or non-existent, the table would fall down: see *CBY15 V Minister for Immigration* [2020] FCA 878 per Kerr J at [87]-[92].
59. It was submitted in relation to the first dot point at paragraph 53 of the Tribunal decision that the evidence showed that the applicant and Mr Vu did attend Holmes College at the same time for a period of a hundred and twenty three days only in late 2009, more than two years

before the applicant claimed to have met the sponsor. They studied different courses.

60. In relation to dot points 2-7 of paragraph 53 of the Tribunal decision, it was asserted that whilst the applicant and Mr Vu may have been on the same flights to and from Vietnam there was no evidence that they travelled in the company of or in close association with each other. It was submitted that the applicant denied having sat next to Mr Vu on the flights. In relation to dot point 8 at paragraph 53 of the Tribunal decision, while it is correct to say that the applicant's child was conceived between the applicant's first visit to Vietnam and her second return visit to Vietnam, this particular time difference proves nothing as there is no evidence that she and the sponsor were together.
61. Dot point 9 at paragraph 53 of the Tribunal decision, is nothing more than speculation devoid of any cultural context of Vietnamese child naming practices.
62. It was wrong of the Tribunal to give some limited weight to the anonymous '*dob ins*' and significant caution should have been exercised.
63. In relation to the financial aspects of the relationship between the applicant and her sponsor, there was no logical basis for the conclusion at paragraph 72 of the Tribunal decision, of the accounts being concocted to provide evidence to support the claims being made. There were differences between the withdrawals made in the joint account between Ms Truong and Mr Nguyen and that of the applicant and Mr Nguyen. In relation to the nature of the household the finding at paragraph 80 of the Tribunal decision that there were a "*similar sets of documents*" provided as evidence of cohabitation between both the applicant and Mr Nguyen and Ms Truong and Mr Nguyen. This was not made out by the evidence. The applicant provided a joint tenancy agreement of the claimed shared premises in Bankstown and Padstow where it was said that she and Mr Nguyen resided. This documentation was not provided in the case of Ms Truong.
64. In relation to the parties' commitment to each other, it was submitted that the Tribunal statement at question 143 of the transcript indicated that the member believed that there was a marriage certificate in

existence between Mr Nguyen and Ms Truong. An examination of the sponsor application made by Ms Truong shows that it did not attach a marriage certificate, rather, simply claimed that Ms Truong and Mr Nguyen were married on 20 January 2013.

65. Finally, it is suggested in ground three, that the Tribunal failed to comply with the provisions of s 359AA of the *Act* in that the Tribunal did not provide precise adverse information as required by the *Act* in order for the applicant to properly comment. This included at question 104 of the transcript that movement record showed “*that you travelled together*” with Mr Vu to and from Vietnam in November 2011, yet all they showed is that they were on the same flights. It was submitted that at question 109 of the transcript, it was put to the applicant that she passed through Customs at the same time as Mr Vu when the record showed that she passed through Customs at 9.40.02, and Mr Vu passed through at 9.40.00. It is submitted that while the two second difference may appear minor, the precision by which the Tribunal was apparently able to identify the times would have given the information greater provenance than was justified. On the second flight there was in fact a 44 second difference which would have been substantial and the Tribunal misleadingly suggested they were actually together at that very moment. The requirements of s 359 of the *Act* are mandatory and a failure to comply will of itself amount to a jurisdictional error: see *SAAP v Minister for Immigration* (2005) 228 CLR 204 at [320]-[322], [345]-[346] and [354]-[355].

The First Respondent’s Submissions

66. Counsel for the first respondent noted this was an unusual situation, whereby information available to the Department indicated that the sponsor of the applicant, Mr Nguyen, made an application to the Department to sponsor a second person, Ms Truong, also sponsored by Mr Nguyen on the same day that the applicant was granted a temporary Partner visa, being 1 February 2013.
67. In this second application Mr Nguyen states he met Ms Truong, in February 2011 and commenced to have a relationship after that date. The parties’ claimed to have married on 20 January 2013. Ms Truong’s partner visa application was supported by statements from friends.

68. An anonymous report to the Department in February 2015 reported that the applicant and Mr Nguyen were in a contrived relationship and that another person, Mr Vu, was in fact the father of the applicant's child. Counsel for the first respondent noted that the Department had written to the applicant advising of information received and seeking DNA testing to prove the parentage of her child. In response, the applicant claimed that she was no longer in a relationship with Mr Nguyen and that Mr Nguyen and his family would not cooperate to provide a DNA sample. It was against this background that the claims of the applicant needed to be assessed by the Tribunal.
69. The applicant's first ground of judicial review contends that the Tribunal's finding at paragraph 52 of its decision, that there was this substantial evidence indicating the applicant knew, and had been in a relationship, with Mr Vu, was unsupported by evidence and failed to take into account evidence and submissions provided by the applicant, such that the conclusion was "*seriously lacking in foundation, rationality and logical coherence*" was thus legally unreasonable.
70. Counsel for the first respondent noted that factual errors made by the Tribunal in support of an adverse credit finding may result in a finding of jurisdictional error by the Tribunal, and whether that is so, depends upon a consideration of the case in hand. In *AVQ15 v Minister for Immigration and Border Protection* [2018] FCAFC 133 at [41] (d) it was stated:

[41]

(d) "Even if an aspect of reasoning, or a particular finding of fact, is shown to be irrational or illogical, jurisdictional error will generally not be established if that reasoning or finding of fact was immaterial, or not critical to, the ultimate conclusion or end result (such as, for example, where it is but one of several findings that independently may have led to the ultimate decision)".

71. In terms of the 10 particulars relied upon by the applicant, in relation to the first particular that the applicant and Mr Vu attended Holmes College together in 2012 '*in the sense that they had attended the college in the company or close association of each other*', the Tribunal did not find that there was evidence that proved that the applicant and Mr Vu attended the college in the company of one

another or close association. It was submitted that it is therefore specious for the applicant to assert that there was no evidence of this. Rather, the evidence indicated that the applicant and Mr Vu attended the college at the same time. It was conceded that there was an error on behalf of the Tribunal in that it referred to 2012 when the evidence showed that they attended at the same time during a period in late 2009 and 2010. It is contended that this was only a part of the evidence upon which the Tribunal relied upon in concluding that the applicant and Mr Vu were in a relationship and was but one factor that undermined the applicant's claim to have been in an exclusive spousal relationship with Mr Nguyen.

72. Secondly, the applicant submitted that there was no evidence to support the Tribunal's finding at paragraph 53 of its decision, second dot point that the applicant and Mr Vu travelled together to Vietnam on the same flight on 6 November 2011 "*in the sense that they had travelled in the company or close association of each other*". Again, the Tribunal did not find that there was evidence that proved that the applicant and Mr Vu were travelling together on the flight. It found that there was evidence that showed that the applicant and Mr Vu had travelled on the same flight, and had gone through Customs at the same time, which indicated they were travelling together. The movement records produced in evidence for the applicant, provided a record of the time of entry into a departure from Australia down to the second, whereas the records and evidence for Mr Vu are only down to the minute.
73. Thirdly, the applicant submitted that there was no evidence to support the Tribunal's findings at paragraph 53 of its decision, third dot point that the applicant and Mr Vu returned together on the same flight '*in the sense that they had travelled in company or close association of each other*'. The first respondent repeats the submission made above, that the Tribunal made no such finding.
74. Fourthly, the applicant submitted that there was no evidence to support the Tribunal's finding at paragraph 53 of its decision, fourth dot point that the applicant, *may* have travelled in a seat next to Mr Vu on their return flight to Australia. It is submitted that the Tribunal did not definitively find that the applicant had travelled in the seat next to Mr Vu. There was no evidence to that effect. However the applicant did

admit during the hearing that if Mr Vu had travelled in the seat next to her on the plane, then it would have been a coincidence, because she did not know him. It was submitted that the Tribunal appreciated the effect of the applicant's evidence in this respect: see paragraph 54 of the Tribunal decision. The possibility that Mr Vu may have travelled in the seat next to the applicant on return flight on 26 November 2011 was not put by the Tribunal as anything more than a possibility.

75. Fifthly, the applicant submitted that there was no evidence to support the Tribunal finding at paragraph 53 of its decision, fifth dot point that the applicant and Vu travelled together to Vietnam on the same flight on April 2012 "*in the sense that they had travelled in the company or close association of each other*". There was evidence that the applicant and Mr Vu passed through Customs within a very short space of time together and was supportive of the couple travelling together as the Tribunal found.
76. Sixthly, the applicant submitted that there was no evidence to support the Tribunal finding at paragraph 53 of its decision, sixth dot point that the applicant and Mr Vu returned to Australia from Vietnam on 26 April 2012 on the same flight "*in the sense that they had travelled in the company or close association of each other*". The applicant relies on its previous submission regarding the previous flight.
77. Seventhly, the applicant submitted that there was no evidence to support the Tribunal's findings at paragraph 53 of its decision, seventh dot point that the applicant gave evidence that she may have travelled in the seat next to Mr Vu on the return flight to Australia. As previously submitted, the applicant did give evidence that she may have travelled in the seat next to Mr Vu on a previous flight but this was not put (by the applicant or by the Tribunal) as anything more than a possibility, which the applicant said would have been a coincidence. This was acknowledged by the Tribunal at paragraph 54 of its decision. The applicant also appears to challenge the Tribunal's finding that the couple each passed through Customs at 9.02 AM however this is precisely what the evidence showed.
78. Eighthly, the applicant submitted that the Tribunal's finding at paragraph 53 of its decision, eighth dot point, that the applicant's child was conceived in the period between the applicant's first return visit to

Vietnam with Mr Vu in November 2011 and the second return visit to Vietnam in April 2012, was not probative of the applicant being in a relationship with Mr Vu. The evidence of the applicant's and Mr Vu's movement supported the finding as to the timing of the conception of the child, which, together with other evidence the Tribunal referred to, including the two anonymous communications received by the Department, pointed to a relationship between the applicant and Mr Vu. The applicant submitted that the Tribunal failed to take into account that the applicant met her sponsor during that period, however that argument cannot be accepted. The Tribunal was well aware of the timing of the applicant's claimed relationship with Mr Nguyen. The Tribunal's concern was that there was significant evidence that was consistent with, and supported, that the applicant was in a relationship with Mr Vu.

79. Ninthly, the applicant submitted that there was no evidence in support the Tribunal's finding at paragraph 53 of its decision, ninth dot point, concerning the name given to the applicant's child. There was evidence of the child's given name. The Tribunal's hypothesis, which was open to it, was that the applicant gave the child the second name of 'Vu' in the light of being the family name of Mr Vu. It was open to the Tribunal to rely on this reasoning process as part of the reason for the conclusion that the applicant and Mr Vu were in a relationship, and that Mr Vu was the father of her child.
80. Tenthly, the applicant submitted that the Tribunal was in error in placing some weight on the anonymous allegations made to the Department that the applicant was in a relationship with Mr Vu, and had a child with him. Plainly these allegations need to be considered by decision-makers, with appropriate caution, as the circumstances dictate. The Tribunal appreciated this: see paragraph 56 of its decision. However, what appeared to move the Tribunal about the content of the anonymous allegations, was that Mr Vu was nominated as the applicant's actual partner and the father of her child. The Tribunal was in possession of evidence that placed the applicant and Mr Vu at the same educational institution for a period of time and, on two occasions, on the same return flights to and from Vietnam. It was open to the Tribunal to give some weight to the allegations. The Tribunal explained

why, despite its usual reluctance to do so, and it placed limited weight on the allegations.

81. In ground two, the applicant asserts that the findings that the applicant and Mr Nguyen were never in a spousal relationship under 5F of the *Act* was unsupported by evidence and failed to take account of evidence and submissions provided by the applicant. The applicant submitted that the Tribunal's conclusion was seriously lacking in foundation, rationality and logical coherence and as a result, was legally unreasonable.
82. The applicant challenges the Tribunal's findings at paragraphs 72 and 73 of its decision. The Tribunal noted that the applicant and Mr Nguyen maintained their own personal accounts and that the primary source of funds into the joint account came from the applicant's family, that other cash deposits to the account were not explained. The applicant's evidence was that the couple dealt mainly in cash rather than using the joint account. These matters were all probative in the Tribunal giving no weight to the joint account as establishing a pooling of financial resources. Further, the Tribunal's reference to the similarities between the joint account and the account in the names of Mr Nguyen and Ms Truong was explained by the Tribunal in that "*there are cash deposits are payments for various purposes*". This reasoning was available and logical.
83. Secondly, the applicant challenges the Tribunal's findings at paragraph 75 of its decision that Mr Nguyen had been complicit in providing receipts both in support of the applicant's and Ms Truong's partner visa applications. The similarity in the receipts referred to by the Tribunal was that the receipts related to the purchase of household items. The Tribunal had a valid concern that at the same time, Mr Nguyen was sponsoring two women, claiming to be an exclusive relationship with each of them. It was submitted there was a substantive and proper basis for the Tribunal's conclusions expressed at paragraph 75 of its decision, not to place weight on the receipts provided in support of the visa application by the applicant and Mr Nguyen.
84. Thirdly in relation to its findings at paragraph 80 of its decision, concerning the nature of the household, the applicant submitted that the Tribunal's findings that the applicant and Mr Nguyen had provided

‘similar sets of documents’ and had thus deliberately manipulated the information so as to support the application, was not supported by the probative evidence. This is not so. Leaving aside the Tribunal’s rather vague description of *‘similar sets of documents’* the Tribunal at paragraph 79 of its decision, specifies what it considered to be similar about the documents provided in the two visa applications sponsored by Mr Nguyen. It was that there was evidence in both applications showing the address at which the parties apparently lived together. The Tribunal also referred to Mr Nguyen as having provided his driver’s license and registration on the Australian electoral roll showing an address for Mr Nguyen that is different from the address given in the applicant’s visa application as the household address, but which matches the address that appears on the Commonwealth Bank account statement for Mr Nguyen’s joint account with Ms Truong.

85. Thus there was conflicting information available to the Tribunal about where precisely Mr Nguyen was living during the period. It was thus open to the Tribunal not to place any weight on the applicant’s documents. It was also open to the Tribunal to place no weight on various supporting statements made by family and friends which indicated that Mr Nguyen was in an exclusive relationship for the purposes of the *Act*, with both the applicant and Ms Truong. Clearly this evidence did not stand up to scrutiny as it was inconsistent with the claims made in the two partner visa applications.
86. Further, the applicant submitted that the Tribunal’s findings at paragraph 81 of its decision, were made without evidence. That is not the case. The applicant gave evidence at the hearing that *“my husband always lived with me under the same roof until the day he left”*, which was earlier said to be in November 2014. The Tribunal’s findings were properly based on this evidence. Secondly, the applicant claims that there was no evidence from Ms Truong’s visa application that witnesses saw Mr Nguyen and Ms Truong together at Ms Truong’s house. There was other evidence in relation to Mr Nguyen and Ms Truong’s partner visa application forms that indicated that the couple were, at the time of the application, living at the same address. It thus cannot be said there was *“no”* evidence at all supporting the Tribunal’s finding at paragraph 81 of its decision, in order for the applicant’s

argument to be accepted: *see AEX15 v Minister for Immigration and Border Protection* [2017] FCA 821 at [35].

87. Finally, the applicant challenged the Tribunal's finding at paragraph 91 of its decision, concerning the applicant's and Mr Nguyen's commitment to each other. There was no error here. There was ample evidence before the Tribunal that Mr Nguyen had sponsored another person for a partner visa and had claimed in his application to be married to Ms Truong. The Tribunal did not make a finding that Mr Nguyen and Ms Truong were married, but that Mr Nguyen had sponsored Ms Truong for a visa and claimed that they were married.
88. The third ground contends that the applicant failed to comply with the provisions of s 359AA of the *Act* in relation to the information contained in the files that related to Mr Vu and Ms Truong. Section 359AA of the *Act* will require the Tribunal to give "...*clear particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review*". How the Tribunal determines to give clear particulars of information will vary from case to case. The touchstone is that it requires the disclosure of so much as to ensure the opportunity to "*comment or respond*" is meaningful: *see SZNKO v Minister for Immigration and Citizenship* [2010] FCA 297 ("*SZNKO*") at [23] per Flick J. In each case, the Tribunal put sufficient information to the applicant such as to comply with the requirements.
89. The Tribunal correctly stated that Mr Vu and the applicant were studying at Holmes College at the same time in 2009. The Tribunal's reference in question 104 of the transcript that the applicant and Mr Vu were travelling together simply meant that they travelled on the same flight. The applicant was given every opportunity to respond to the information derived from further movement records, including the fact that the applicant and Mr Vu went through Customs at the same time. It cannot be suggested that a two second difference is of any moment.
90. The information put at question 144 of the transcript onwards, described in detail the nature of the information which the applicant was invited to comment on. Its references to the documents being "*remarkably similar*", was the Tribunal's characterisation. No error is made out. The Tribunal was not required to produce the documents to

the applicant, as the Tribunal explained that the applicant, who was represented by her migration agent, had the opportunity to seek an adjournment at a later time.

Consideration

91. It is well established that it is for the applicant to establish that they meet the requirements for the grant of the visa sought; see *Abebe v Commonwealth of Australia* (1991) 197 CLR 510 at [187]. Further as set out above a mistake of fact by the Tribunal unless it is critical to the ultimate conclusion will not establish jurisdictional error: see *Minister for Immigration and Citizenship v SZNGP* [2010] FCAFC 51.
92. Legal unreasonableness, of which illogicality or irrationality, are a subset of, is fact dependant and the test is stringent: see *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225 at [26].
93. The Court notes the relevant provisions of s 5F of *Act* which sets out the definition of ‘spouse’ for the purposes of the *Act*.

*(2) For the purposes of subsection (1), persons are in a **married relationship** if:*

(a) They are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) Do not live separately and apart on a permanent basis.

94. This definition was the touchstone that the Tribunal evaluated the evidence against. If the Tribunal found that there was insufficient evidence to meet the above definition, then it was bound to come to the decision it did.

95. In relation to ground one, the applicant takes issue with almost every factual finding made by the Tribunal in the hope that if one or two may be found lacking, then the whole of the Tribunal decision falls down. That approach however fails to look at the evidence as a whole in looking at whether the Tribunal decision is legally reasonable. Counsel for the applicant seeks to attack the detail of the conclusions rather than looking at the evidence overall.
96. If the applicant's evidence is to be believed, she has been the victim of a set of extraordinary coincidences. False allegations have been made against her, not once but twice, that she is in contrived relationship with Mr Nguyen to gain residency in Australia.
97. Further, a person that the applicant claims she has never met, notwithstanding she was at the same College for a period of time in 2009-2010, not 2012 as the Tribunal stated, was named to the Department as a person who she was really in a relationship with and the father of her child in two '*dob ins*'. In the Court's view, the error in the year is of no importance to the reasonableness of the decision as a whole.
98. The child again, as a matter of sheer coincidence, was given the second name of Vu, being the surname of the person named in the '*dob in*' as being the father of the child as compared to Mr Nguyen, the person named on his birth certificate as the father of the child, but whose surname the child was given.
99. If the applicant is to be believed, it is sheer coincidence again, that she travelled with Mr Vu, to and from Vietnam, not once but twice on a total of 4 flights, passing through Australian Immigration and Customs controls within a very, very short time of each other. As the applicant said she did not know Mr Vu, she could not say if he sat next to her on one the flights but conceded that he '*may*' have.
100. All of the above, occurs in circumstances where the sponsor, Mr Nguyen, makes an application to sponsor another woman, Ms Truong, on the very day that the applicant is granted a temporary partner visa, claiming he had been in a relationship with Ms Truong for some time prior to the application and the he and Ms Truong had married at the same time Mr Nguyen was legally married to the applicant.

101. When looking at the other evidence, the Tribunal did not have the benefit of any evidence from Mr Nguyen, he having separated from the applicant and his whereabouts were apparently unknown to the applicant. Further, the applicant was unable to obtain a DNA sample requested by the Department from either Mr Nguyen or any member of his immediate family to prove that Mr Nguyen was the father of the applicant's child.
102. The applicant's claims were also in circumstances where the applicant denied any knowledge of child support laws and had made no application to the Child Support Agency for child maintenance from Mr Nguyen in respect of '*his child*'.
103. The Court is of a view that the factual conclusions made by the Tribunal at paragraph 53 of its decision were open to it, based on the evidence on a cumulative basis. None of the conclusions meet the stringent test for illogicality or irrationality such as to constitute legal unreasonableness. The Court accepts the submissions of the first respondent set out above in this regard. None of the individual dot points in paragraph 53 of the Tribunal decision of themselves, is critical to the overall finding of the Tribunal that the applicant was not in a relationship with Mr Nguyen.
104. The findings at dot point 8 of paragraph 53 of the Tribunal decision, do nothing more than show the possibility that the applicant and Mr Vu were in a relationship. The Tribunal did not conclude based on this information that Mr Vu was the father of the child.
105. The Court is not satisfied that improper use was made by the Tribunal of the '*dob ins*'. The Tribunal properly instructed itself as to the danger of relying upon such information. Rather, it used this information to closely consider the other information before it, finding that it supported the conclusion it came to as to the credit of the applicant and that her evidence was not to be believed. Ground one reveals no jurisdictional error.
106. In relation to ground two, the Court is satisfied that the conclusions of the Tribunal as the similarities of the evidence presented in both the applicant's application for a visa and that of Ms Truong were similar is unremarkable. In each case, bank accounts were provided that showed

a joint account in the name of Mr Nguyen and the applicant and Ms Truong and Mr Nguyen. Each showed money coming in and money coming out. Neither account appeared to show regular deposits on behalf of Mr Nguyen. The evidence shown in the bank accounts was of the type that would need to normally be presented to support the claim the joint household in terms of a pooling of financial resources. Given the existence of two sets of joint bank accounts between Mr Nguyen and the applicant on one hand, and Ms Truong on the other, it is perhaps unsurprising that the Tribunal decided not to place any weight on the applicant's documents.

107. It is impossible to reconcile the evidence in Ms Truong's application that shows Mr Nguyen's driver's license and registration on the Australian electoral roll as matching the address given by Ms Truong, which is different from the address shown in the applicant's application which was supported by a joint tenancy agreement. Given this conflicting information and to where Mr Nguyen was living at the relevant time, the Tribunal was entitled not to place any weight on this information.
108. The challenge to the finding at paragraph 91 of its decision, by the Tribunal concerning the applicant's and Mr Nguyen's commitment to each other cannot be sustained. The findings by the Tribunal are again unremarkable. The established and unchallenged facts in relation to the applicant's application sponsored by Mr Nguyen as well as that by Ms Truong, indicate that, no matter what the applicant may have presumed was the case, Mr Nguyen was not in a spousal relationship with her that had a mutual commitment to each other to a shared life as a married couple to the exclusion of all others and that the relationship was genuine and continuing. Counsel for the applicant contends the applicant may have been duped by Mr Nguyen. Even if the Court were to accept that, the Tribunal was entitled to find based on the evidence that Mr Nguyen was not in a spousal relationship with the applicant for the purposes of s 5F of the *Act*.
109. In relation to ground three, the challenge that the Tribunal did not comply with the procedure set out in s 359AA of the *Act*, Counsel for the applicant seeks to argue that material put to the applicant was either

incorrect or did not provide sufficient detail for the applicant to fully respond to it. In relation to this, it must be firstly noted that at the commencement of the hearing the Tribunal member outlined to the applicant that he would be putting information to her which may be adverse and form part of a decision to affirm the decision under review. The applicant's rights were fully set out. This included the right to seek an adjournment if required. At no time during the hearing did the applicant seek an adjournment in order to provide additional information or consider the matters that were being put to her. This was also in circumstances where the applicant was legally represented.

110. The Court agrees with Counsel for the first respondent that the reference in question 100 of the transcript, the Tribunal did not misstate the evidence. Mr Vu was studying English and a Business Administration course at the same time that the applicant was studying English at the Holmes College in 2009. It is conceded however, that the Tribunal misstated the year as 2012. The Court is not satisfied this error was material. The applicant knew when she was at Holmes College.

111. Secondly, the Tribunal's reference at question 104 of the transcript, to the applicant that she and Mr Vu travelled together simply meant, read in context, that they travelled on the same flight. Information was put to the applicant from the movement records and she was invited to comment on that material. The applicant denied that she knew who Mr Vu was, and was unable to explain how it could be, other than sheer coincidence that Mr Vu travelled on the same flights with her to and from Vietnam on two return trips, a total of four separate flights, in each case clearing Customs within a very, very short time of each other both in and out of Australia. The Court accepts the second respondent's submission that the clarifications at questions 106 and 113 of the transcript, were strictly not part of the s 359AA of the *Act* procedure, but an attempt to clarify the information being provided by the applicant. The Court is satisfied, that the opportunity for the applicant to respond to the information was meaningful: (see *SZNGO*).

112. The Court rejects the submission by Counsel for the applicant that it was incorrect to put to the applicant that she and Mr Vu went through Customs and Immigration in Australia at the same time. The time differences are so small as to be a distinction without a difference.

113. The Court completely rejects the assertion made that the applicant had no idea of what the correct information was, and was completely unable to provide an adequate response to the Tribunal. It may well be that the applicant was unable to provide answers to issues being put to her other than being sheer coincidence because her evidence was untruthful. The Court makes no conclusion in this regard as it is not necessary to do so. The Court is however satisfied that in each of the incidences complained of, the Tribunal relevantly complied with the provisions of s 359AA of the *Act* such that no jurisdictional error is revealed. Ground three reveals no jurisdictional error.
114. Given the totality of the evidence, even if the Court is wrong in its finding that each of the factual findings of the Tribunal is legally reasonable, the totality of the evidence provides an overwhelming case that the applicant could not satisfy the Tribunal that she was in a spousal relationship with Mr Nguyen that met the requirements of s 5F of the *Act*. Mr Nguyen could not be in a relationship with two women at the same time and meet the requirements of s 5F of the *Act*.

Conclusion

115. Accordingly, as none of the grounds for judicial review have been made out, the application is dismissed.

I certify that the preceding one-hundred-and-fourteen (114) paragraphs are a true copy of the reasons for judgment of Judge Humphreys

Associate:

Date: 12 February 2021